

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND R. HARRIS,

Defendant-Appellant.

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UNPUBLISHED

December 18, 2001

No. 222307

Wayne Circuit Court

LC No. 99-000399

Before: Owens, P.J., and Holbrook, Jr., and Gage, JJ.

HOLBROOK, JR., J. (concurring).

I agree with the result reached by the majority. I write separately because I respectfully disagree with the majority's conclusion that the use of defendant's post-arrest, pre-*Miranda*<sup>1</sup> silence was not error. I believe that the presentation of this evidence as substantive evidence of defendant's guilt in the prosecution's case-in-chief was plain error. Nonetheless, I agree that reversal is not warranted because defendant has failed to show that he was prejudiced by the error.

A defendant's right to remain silent is a constitutional guarantee that derives from the Fifth Amendment of the federal Constitution, not from *Miranda* warnings. The Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." US Const, Am V. The privilege against self-incrimination "attach[es] before the institution of adversarial proceedings, and although 'the presence of *Miranda* warnings might prove an additional reason for disallowing use of the defendant's silence as evidence of guilt, they are not a necessary condition to such prohibition.'" *Ouska v Cahill-Masching*, 246 F3d 1036, 1047 (CA 7, 2001), quoting *United States ex rel Savory v Lane*, 832 F2d 1011, 1018 (CA 7, 1987). See also *United States v Whitehead*, 200 F3d 634, 638 (CA 9, 2000) (holding that "regardless whether the *Miranda* warnings were actually given, comment on the defendant's right to remain silent was unconstitutional"). Thus, once an individual is placed into custody, "that person has a right to remain silent in the face of government questioning, regardless of whether the *Miranda* warnings are given." *United States v Velarde-Gomez*, \_\_\_ F3d \_\_\_ (CA 9, 2001)(en banc); accord *United States v Moore*, 322 US App DC 334, 346 (1997)(concluding that

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

the prosecution cannot use a defendant's "silence against him as evidence of his guilt"). But see *United States v Rivera*, 944 F2d 1563, 1568 (CA 11, 1991).

This does not mean, however, that a prosecutor is absolutely prevented from commenting on a defendant's post-arrest, pre-*Miranda* silence. If a defendant elects to testify at his criminal trial, a prosecutor may impeach the defendant with his post-arrest, pre-*Miranda* silence. *Fletcher v Weir*, 455 US 603, 607; 102 S Ct 1309; 71 L Ed 2d 490 (1982) (per curiam). See also *Mitchell v United States*, 526 US 314, 338 n 2; 119 S Ct 1307; 143 L Ed 2d 424 (1999) (Scalia, J., dissenting); *Velarde-Gomez*, *supra*; *Whitehead*, *supra* at 638. This is the situation that this Court was faced with in *People v Alexander*, 188 Mich App 96; 469 NW2d 10 (1991). Like the case at hand, *Alexander* involved questioning about a defendant's post-arrest silence. *Id.* at 104. Also like this case, it was unclear whether the defendant in *Alexander* had been given his *Miranda* warnings prior to the circumstances that were the focus of the questioning. Significantly, however, the question in *Alexander* came during cross-examination of the defendant, not during the presentation of the prosecution's case-in-chief. *Id.* at 100. Thus, it was offered as impeachment evidence, not substantive evidence of the defendant's guilt.

Here, the prosecution elicited testimony about defendant's post-arrest, pre-*Miranda* silence during its examination of the arresting officer. This was a violation of defendant's right to remain silent. *Velarde-Gomez*, *supra*; *Whitehead*, *supra*.

I also disagree with the majority's focus on the relevance of this evidence. The majority observes that "[f]rom a purely evidentiary standpoint, defendant's silence when the officer found the contraband in his pocket was relevant to his consciousness of guilt." *Ante* at \_\_\_. In support of this conclusion, the majority cites *People v Schollaert*, 194 Mich App 158; 486 NW2d 312 (1992). However, unlike the case at hand, *Schollaert* involved testimony regarding a defendant's pre-arrest, pre-*Miranda* silence. *Id.* at 160, 164.<sup>2</sup> Accordingly, I do not believe that *Schollaert* is relevant to the case at hand.

Regardless of the probative value of such evidence, the danger of unfair prejudice that inheres in this negative inference is just this sort of danger that the Fifth Amendment is designed to protect against. "The right to remain silent carries an implicit assurance that silence will carry no penalty." *Guam v Voloria*, 136 F3d 648, 652 (CA 9, 1998).

Therefore, I would hold that questioning the arresting officer about defendant's post-arrest, pre-*Miranda* silence was plain error. However, for the reasons set forth by the majority, I conclude that defendant has failed to show that the error affects the outcome of the proceedings.

/s/ Donald E. Holbrook, Jr.

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<sup>2</sup> The United States Supreme Court has not yet ruled on whether the Fifth Amendment precludes the use as substantive evidence of pre-arrest, pre-*Miranda* silence. *Jenkins v Anderson*, 447 US 231, 236 n 2; 100 S Ct 2124; 65 L Ed 2d 86 (1980). The federal circuit courts are split on this issue. *United States v. Thompson*, 82 F3d 849, 855 (CA 9, 1996).